SOCIAL LEGISLATION AND THE COURTS

BY HENRY CAMPBELL BLACK

In recent years society has been taking a fresh appraisement of its own constitution, and has found much ground for dissatisfaction. The relations between those who work and those who employ the labor of others are in process of review and reformation; and this process involves the recognition of the general public as a third party, and one that is deeply concerned in those relations. New ideas are coming to the front as to the reciprocal rights and duties of the individual and the community and the relation of government to both. There is a turning away from the old *laissez-faire* nonchalance; liberalism is in the ascendant; progress is the motto of the hour.

Looking at only one aspect of this significant movement, it may be said that this is a time when the class consciousness of the workingmen has reached its maximum, when the demands of labor are given paramount consideration in the counsels of the nation and indeed of the world, when we can perceive the industrial revolution actually in progress, and not unreasonably anticipate a reorganization of the world's work in accordance with labor's own programme. In the wider view, we see that the great body of social legislation (including much beside the making of laws for the protection and advantage of the workers) is continually growing, pushing out into new fields, abolishing old canons and harsh rules, raising new standards, encroaching more and more upon the domain of individual liberty as the conception of the solidarity of society widens the outlook of men. And all of it must pass the scrutiny of the courts. For every progressive measure, every statute designed to redress an industrial wrong or inaugurate an industrial reform, and practically every law put upon the books in the execution of the new social programme, is bound somewhere to come in conflict with private or corporate interest, to cross the path of individual initiative, or to limit the

freedom which men have been accustomed to exercise in the government of their own affairs. All such enactments, therefore, are challenged. Suits are brought to test their validity. It is argued that they cannot stand, because they violate the provisions of the constitutions. And the decision is with the courts; on their arbitrament depends the fate of the law in question.

On the one hand, the judicial tribunals have no warrant to thwart the will of the people as expressed through their legislative representatives, if the bounds of their constitutional power have not been overpassed. On the other hand, if a piece of legislation is indubitably contrary to some one or more of the provisions of the Constitution of the State or of the Union, the courts have no choice as to the course they will pursue. They must pronounce it null and void. That is their sworn duty. They cannot disobey the higher law. Occasionally they have been required to pass judgment upon some statute deemed especially favorable to the interests of a class or group or organization, or one which was widely and popularly approved, and have found it in irreconcilable conflict with the organic law. Every such decision brings forth a storm of protest, indignation, and vituperation.

Is this last circumstance a mere passing and insignificant phenomenon? Unfortunately, it is not. It is symptomatic of a continuous attitude towards the courts of justice maintained by considerable portions of the community. There is always an undercurrent of hostility against this constitutional function of the courts. It is asserted that it is based upon a "usurpation" of authority; its exercise is denounced as a "judicial veto." This must be regarded as a very disquieting fact, for it is an ever present menace to the stability of constitutional government. And even though it has no justification in law or in fact, it is especially and peculiarly a cause for apprehension and concern in a period of reorganization and social experimentation such as the present.

How, it may be asked, are the courts actually proceeding in the face of this sentiment? They are confronted with their own peculiar and difficult problem. On the one hand presses the concrete force of the social will as formulated in statutes; on the other hand stand the abstract and generalized inhibitions of the

constitutions. A survey of the constitutional decisions of the past twenty years or more suggests the theory that the courts are successfully escaping from the dilemma, first, by abandoning the conception of the written constitution as a yard-stick and recognizing its possibilities of growth; second, by conceding a due weight to the popular, as distinguished from the juristic, interpretation of the Constitution, and third, by contributing to the growth of a system of constitutional policy.

A written constitution, like that which has been established for the United States or for any one of the States, cannot remain a set of immutable formulas, dead and embalmed for all time. It must function as an organism. That is, it must live and grow with the life and growth of the society which it purports to govern, or else, to the extent that it remains stationary and unresponsive to the urge of an expanding public consciousness, it will be discarded by that society, either silently or with violence, and in either case it will lose its authority as law and become no more than an historical document.

Now there are at least four ways in which a written constitution can grow. First, by conscious and intended change effected in accordance with methods provided by the constitution itself. Several times within the last few years the people of the United States, acting through their representatives in Congress and then through their State legislatures, have expressed their conviction that the national Constitution should be amended, and it has been changed in conformity with their desires, and in each case the movement has been one of growth and not of contraction. Second, a constitution may undergo a process of unconscious and gradual modification without formal amendment. This happens when usages and customs grow up around a rigid constitution, which do not so much contravene it as supplement it, but which eventually replace or transform some of its provisions. A conspicuous illustration may be found in the history of the electoral college. The framers of the Constitution had no idea of committing the selection of a President to the general body of voters. The "electors" were meant to be a carefully chosen body, charged with entire responsibility for the nomination of candidates and voting according to their personal convictions. But by a custom

or usage of the Constitution it has come to pass that the candidates are named by party conventions, and the people cast their ballots for a set of intermediaries, who formally comply with the letter of the Constitution but automatically vote the ticket of their party. Thus the formulas of the Constitution are preserved, but they have been in this respect emptied of all meaning. The people have changed their Constitution, without disobeying it, by the growth of a habit. Third, a written constitution may grow as a consequence of the interpretation of its various provisions by the courts. It is not necessary to repeat the familiar story of the expansion of the Federal Constitution under the vigorous hands of Chief Justice Marshall and his associates. They changed no word of it. Only a few of its provisions underwent the process of a constructive enlargement. But as it stood, it might have fitted a feeble alliance of proud and not very concordant semi-sovereignties. As they left it, it fitted a powerful, autonomous, and closely compacted nation.

But in the fourth place—and this is the point to be especially emphasized here—a constitution may change and expand through a process of interpretation *by the people*, growing out of their progressing views of morality or of social and industrial relations. This last is unconscious. That is, the people are mostly unaware of the process, or they have no deliberate and continuous intention in regard to it, although, at any moment when their attention is sharply pricked, they may perceive the result. It is, furthermore, not specific nor very definitely formulated. It does not base itself upon the words or phrases of the Constitution. It is not a syllogism but a sentiment. It takes but little account of the framework of institutions and still less of precedent and tradition, for its wellsprings lie in the genius of our race and in the popular understanding of American liberty and self-government. Again, it is expectant rather than empirical. It assumes that the constitutions will be found in harmonious relations with the will of the people as each successive occasion shall arise. But it does not reason from experience, and this assumption has very little if anything at all to do with the judicial history of the Constitution. Finally, it is not at all legalistic, but it is intensely pragmatic. If the popular conception of con-

stitutional government could be made articulate, it might be heard expressing itself in terms somewhat like these:

"This is a government of the people by the people. Whatever the people deliberately decide upon in the way of governmental action they should be allowed to carry through. That is why we have our written constitutions. They were meant first to establish popular government and then to insure its continuity. They were not designed to cast society in rigid lines; on the contrary, their function is to give its expansion full play. Now this is an era of change. The day of intensive individualism is past. We are no longer an aggregation of units: society is the unit. Democracy is an organization of society in which every man is the keeper of his brother's welfare. Whatever injures or debases one reacts upon the whole. Whatever elevates one makes for the common good. Moreover, it is not an age of simple and uncomplicated relations. More and more the complexity of social and industrial interactions increases. So it is necessary to revise old rules, to discard outgrown standards. The principles of justice, it is true, are immutable, but in the distribution of justice we must take cognizance of the needs and the opportunities of the day and hour. Of course we know that our constitutions contain prohibitions and limitations. No one may be deprived of his life, liberty, or property without due process of law; all are entitled to the equal protection of the laws, and so on. But these are promises. They make safe forever the fundamental rights of free citizens. But they are not shackles to bind the feet of democracy, forever struggling to its distant goal. They are not manacles to chain its upward-reaching hands. If it were so, woe to democracy!"

When this general and liberal understanding of the meaning of the constitution is brought to the test of criticism by the courts, there is popular expectation that it will be adopted and followed. If it is not, in any notable case, there is a shock of surprise. It is then that the courts are denounced as reactionary and narrow-minded. It is then that the outcry rises against legalism. It is then that proposals come to the fore to deprive the courts of their authority to adjudge laws unconstitutional. The demand for the recall of judicial decisions is precisely a

demand for the right to substitute the *popular* interpretation of the constitution for the *juristic* interpretation. But popular interpretation must be translated into juristic interpretation, because otherwise it cannot take form and become definitely applicable to concrete cases. There is no way in which it can become practically effective except when it is to be applied to the rights of individual persons. Yet popular interpretation cannot be allowed to destroy constitutional limitations altogether; otherwise, public opinion would be the only constitution.

This, then, has been and still is the problem for the courts: to translate popular interpretation into juristic interpretation to the utmost extent compatible with saving the Constitution itself. And anyone who has studied the course of their decisions with an unprejudiced mind, and who has looked at them as human documents as well as legal judgments, will be justified in saying that, in the solving of their problem, our judges have been neither reactionary nor narrow-minded, but that, on the contrary, they have shared the popular vision and had sympathy with the popular aspirations, and so have aided and not retarded the growth of the Constitution.

For instance, in the marvelous expansion of the police power, from a function strictly confined to a few specific purposes to a practically unrestrained authority to legislate for the general welfare, the courts have not led public opinion, much less created it. But they have observed it, they have recognized it, recognized even that it has insensibly changed the constitutions, and they have given effect to it in their decisions.

Again, there has been a widening of the powers and activities of the Federal Government far beyond the prevision even of Chief Justice Marshall. There has arisen a "doctrine of paramount necessity," which is in effect a belief that Congress, under the guise of one or another of its admitted powers, can and should do anything which seems to be for the welfare of the whole country and which the separate States either cannot or will not unite in providing for by adequate legislation. And this is almost entirely the outgrowth of a changing popular conception of the scope and functions of the National Government. Insensibly it

has modified the Constitution. The courts have neither prompted nor fostered it, but they have recognized and acceded to it.

But the opportunity for the courts to exercise discretion, to adopt an attitude, to follow or retard a popular tendency, grows out of the fact that some of the most important of the constitutional limitations are expressed in general and indefinite language. If all were as precise as that which forbids the enactment of "bills of attainder and *ex post facto* laws," the courts would be held in rigid limits, and any manifestation of a tendency or proclivity on their part would be next to impossible. But such phrases as "due process of law" and "the equal protection of the laws" are so nearly incapable of exact definition that the courts have steadily refused all invitations to mark out their limits. Moreover, there are implied limitations in the constitutions—implied in the sense that they are thought to be implicated in the broad terms of some of the indefinite clauses, or that they emerge as a generalization from some of the conclusions that have been definitely reached as to what those clauses do or do not mean. These implied limitations set up barriers to legislation which are called by some such names as "justice," "reasonableness," "liberty," and "the inalienable rights;" and these terms, although they also are hard to define, certainly do make a nearer approach to correspondence with a concrete idea.

It is these implications or generalizations which now have weight with the courts. Left to deal at will with the broad and indefinite limitations of the constitutions, they have refused to give ear to the counsels of a dry literalism. Instead, they are trying to solve their problem by digging out the living meaning of such constitutional declarations, in the endeavor thus to arrive at norms and standards which shall serve the practical purposes of contemporary life. The matter is well put by Professor Corwin in the following terms:

> Our courts today, in construing the Constitution, are in a position to avail themselves of the modern flexible view of law as something inherently developing, in a way never before possible to them. All constitutional limitations setting the bounds between the rights of the community and the rights of the individual have tended of recent years to be absorbed into the constitutional requirement of "due process of law," and this requirement, in turn, has come

to take on the general meaning of "reasonable law." So far as constitutional theory itself is concerned, there is small ground for the complaints leveled by reformers at judicial review. (Edward S. Corwin, *The Doctrine of Judicial Review*, pages 64, 65.)

This progress from literalism to liberality is very clearly illustrated by certain observations of Mr. Justice Holmes in a decision rendered in 1911. He said:

We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown easily enough to transgress a scholastic interpretation of one or another of the great guarantees in the bill of rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power. (Noble State Bank vs. Haskell, 219 U. S. 104.)

It is no less true, on the other hand, that that with which the due process clause is brought into opposition is just as indefinite and unprecise, just as refractory to any attempt at delimitation. Without attempting here an account of the expansion of the police power, or of the present understanding of the subjects to which it may reach, it may be sufficient to quote Mr. Justice Field in saying that neither the Fourteenth Amendment,

broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. (Barbier vs. Connolly, 113 U. S. 27.)

It is in the conflict of two indefinites—the due process clause on the one hand and the police power on the other hand—that opportunity arises for discussion, adjustment, adaptation, and for the translation into a juristic, and hence authoritative, interpretation of that understanding of the Constitution which has already been reached by a process of popular interpretation. And as a result of the constantly recurring necessity of making decisions in cases which arise in this field of conflict, there has grown up an extensive body of constitutional case-law. Re-

garded superficially, it is only a series of precedents. But closer study of it reveals the steady growth and evolution of a system of constitutional *policy*. And notwithstanding occasional lapses into "drily logical" reasoning, or of academic timidity in regard to the accelerating process of liberalizing the constitutions, this is the broad ground upon which our courts seem destined ultimately to take their stand, even if they have not already done so. This matter has been very well set forth by Professor Ernst Freund in a recent work (*Standards of American Legislation*, page 211), in which he says:

> The idea of a constitutional policy and corresponding rights and limitations was readily entertained, not only by the courts, but by the great preponderance of public and professional opinion, and to a very considerable extent this opinion prevails today. This point of view should control the interpretation of much that goes on in America under the name of constitutional law. The decisions enforcing so-called inherent limitations are among the most loosely reasoned in our entire case law. There is much talk about inalienable rights on the one side and about the police power on the other; as the case may be, either denunciation of the arbitrary will of the legislature, or disclaimer of judicial superiority of judgment or power of control; practically the only criterion that is suggested is that of reasonableness. From the point of view of legal science it would be difficult to conceive of anything more unsatisfactory. Extreme indefiniteness, however, appears in the light of a wise avoidance of irrevocable conclusions, if we apply to this phase of constitutional law as a whole the test of political performance. The greatest defects of the decisions from a legal standpoint constitute their saving grace. No constitutional right is asserted without placing in convenient juxtaposition a saving on behalf of the public welfare. No rule has been formulated in such a manner as to embarrass an honorable retreat, and if an inconvenient precedent is encountered, there is little hesitation in overruling it. Even the brief period of thirty years, during which the courts have enforced constitutional policies, has been sufficient to demonstrate that any apprehension of a permanent hindrance on their part to any phase of legislative progress is groundless. Indeed, there is rather reason to fear that the courts will exercise the guardianship committed to them with less confidence and boldness than is desirable. A legislative body, in pursuing some particular social or economic policy demanded by popular clamor for the attainment of tangible and immediate objects, will easily be inclined to underestimate and neglect the larger policy of individual right and liberty which at one time was believed to be safest in its hands. For the protection of these lesser and more permanent interests, so essential to the maintenance of our institutions, we naturally look to the courts, which by constitution and habit are best qualified to appreciate the claims of individual right.

One thing more should be said as to the problem of the courts. They should be helped in solving it by being supplied, from some outside source, with an adequate collection of the facts and statistics bearing on the particular case. Very often the "reasonableness" of a statute, in the sense of constitutional policy, will depend on the existence or the extent of a public need for it, or on the probability of its bringing the expected benefits to the public at large. It is not fair to expect our judges to be eminent sociologists and infallible economists. Yet these are the sciences which alone, in many of the most difficult cases, can supply the data necessary to an intelligent decision of the questions of fact involved. An interesting and probably helpful suggestion in this direction was made by the Federal Commission on Industrial Relations in 1916 (Final Report, page 205), as follows:

> Criticisms of the courts for decisions overturning laws designed to protect labor, and the demands for constitutional amendments to deprive the courts of power to declare laws unconstitutional, or providing for the recall of decisions or recall of judges, often fail to reach the real difficulty. The difficulty is that bureaus or departments of labor and statistics have been so incompetently managed, or their investigations so remote from the concrete facts that need to be established, that the courts have had no reliable information and have been compelled to fall back upon their own meager information or "common knowledge." If the court had at hand a reliable and well-equipped referee with power to get the facts, as in the (proposed) Industrial Commission, it is probable that it would call upon such referee instead of basing its judgment upon the doubtful claims and technical arguments of attorneys.

HENRY CAMPBELL BLACK.